Supreme Court, U. S.
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In the
Supreme Court of the United States

October Term, 1974

No. 73-2054

HUDSON BERLIND CORPORATION,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Lawrence Rosenbluth
Rosenbluth & Rosenbluth
342 Madison Avenue
New York, New York 10017

Henry P. Monaghan
10 Post Office Square
Boston, Massachusetts 02109

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NATIONAL LABOR RELATIONS BOARD,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Hudson Berlind Corporation respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Second Circuit. The judgment in this proceeding was entered on April 25, 1974.

Opinions Below

The opinion of the Court of Appeals is reported at 494 F.2d 1200, and it appears in the appendix at pages 15-22. The opinions of the National Labor Relations

Board and of the administrative law judge are reported at 203 N.L.R.B. No. 63, and they appear in the appendix at pages 23 *et seq.*

Jurisdiction

The judgment of the court of appeals was entered on April 25, 1974. This petition for certiorari was filed within 90 days of that date. Jurisdiction is invoked under 28 U.S.C. § 1254.

Questions Presented

1. Did petitioner commit an unfair labor practice simply upon a showing that it executed a collective bargaining agreement with the clearly largest of two unions at a time when these unions represented employees at two separate corporations and facilities the operations of which were acquired and then consolidated at a new location.

2. Is the decision below in conflict with those of the Sixth Circuit in *N.L.R.B.* v. *Wheland Company*, 271 F.2d 122 (1959) and *American Bread Company* v. *N.L.R.B.*, 411 F.2d 147 (1969) and that of the Ninth Circuit in *N.L.R.B.* v. *Peter Paul, Inc.*, 467 F.2d 700 (1972).

Statutes Involved

Sections 8(a)(1), (a)(2), (a)(3) and (a) (5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), (a)(2), (a)(3), and (a)(5). In material part they provide:

> SEC. 7. Employees shall have the right to self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also

have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, ...

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and....

(5) to refuse to bargain collectively with the

representatives of his employees, subject to the provisions of section 9(a).

Statement of the Case

The facts are simply stated. H. Berlind, Inc. ("Berlind") and Hudson Housewares Corporation ("Hudson") engaged in the wholesale distribution of household goods. Their locations were different: Berlind conducted business at Floral Park, New York; Hudson, in Brooklyn. Their warehouse employees were represented by different unions: Berlind's *ten* employees by Local 810;[1] Hudson's *thirty-one,* by Local 222.[2] (App. pp. 15-16)

The present controversy stems from the acquisition of both companies by Greenman Brothers, Inc. ("Greenman"). That acquisition was accompanied by the subsequent consolidation and transfer of the operations of both corporations to a new site at Hicksville, New York. The process began in September of 1971 when Greenman acquired Berlind. In December, Greenman acquired Hudson. In January of 1972 Hudson was renamed Hudson Berlind Corporation, petitioner here, in anticipation of the consolidation. From January 31 to March 10, 1972, petitioner's operations were transferred to the new site. Berlind's operations were not transferred until June of 1972. (App. pp. 16-17).

Petitioner had no desire that the consolidation should disadvantage existing employees, and it fully expected that many, if not all, of these employees would accept employment at the Hicksville site. The collective bargaining agreements for these employees were due to expire

[1] Steel, Metals, Alloys and Hardware Fabricators and Warehousemen, affiliated with the International Brotherhood of Teamsters.

[2] Affiliated with the International Production Service and Sales Employees Union.

at roughly the same time: Hudson's on March 15, 1972; Berlind's on April 18, 1972. On January 31, 1972, petitioner entered into a collective bargaining agreement containing a union security clause with Local 222 for the new facility. Local 222, it will be recalled, represented Hudson's *thirty-one* employees. There is no allegation that, in executing the agreement, petitioner acted in bad faith or for any improper purpose. To the contrary, the Court of Appeals explicitly recognized that petitioner entered into the agreement because "Local 222 represented a larger number of warehouse employees than Local 810." (App. p. 16)

When petitioner commenced business operations at the new site in March of 1972 twenty-one of the original thirty-one Hudson employees were in employment. Ten new employees were hired. No Local 810 employees were employed at the Hicksville site until June of 1972, when operations at Floral Park were ended. (App. p. 17) Accordingly, whether viewed on January 31, when the agreement was executed, on March 15, when petitioner commenced operations at the new site, or in June when the ten Local 810 employees arrived, Local 222 represented a clear majority of the employees at the Hicksville site.[3]

Overruling the recommended decision of its administrative law judge, a three-member panel of the National Labor Relations Board found that, on these facts, petitioner had violated §§ 8(a)(2) and also 8(a)(1) and 8(a)(3) of the National Labor Relations Act. 29 U.S.C. §§ 151(a)(1), (a)(2) and (a)(3). The violations need not be considered separately for they rest upon a common foundation, the so-called *Midwest Piping* doctrine. *Midwest Piping & Supply Co.*, 63 N.L.R.B. 1060 (1945). Simply stated, under *Midwest Piping* an employer commits an unfair labor practice unless it remains "neutral" when

[3] The Board found that petitioner's new Hicksville facility constituted "a separate bargaining unit," (App. p. 18), a finding not challenged here.

"faced with conflicting claims of two or more rival unions which give rise to a real question concerning representation." *Novak Logging Co.*, 119 N.L.R.B. 1573, 1574 (1958). As a general formulation that rule is common ground here. But the Board's conclusion (App. p. 40) that a "real dispute concerning representation" existed in this case was contrary to the conclusion of the administrative law judge (App. pp. 31-32) and, as we shall show, the Board's general approach to that question raises important and far reaching questions in the administration of the act.

On petition for enforcement, the Court of Appeals enforced the Board's order, noting that "we have approved [*Midwest Piping*] on several occasions." (App. p. 19) But that Court made no independent determination of the basis of the Board's crucial conclusion that a "real dispute concerning representation" existed, treating that question as only one of the sufficiency of the evidence. All the Court said was:

> "We realize that the consolidation of separate operations can lead to difficult problems of labor relations for employers, see, e.g., the situation in *Wheland Co.*, 120 N.L.R.B. 814 (1958), enforcement denied, 271 F.2d 122 (6th Cir. 1959). Be that as it may, *we find substantial evidence to support the Board's finding that there was a real question* concerning representation when Hudson Berlind signed the agreement with Local 222 and its conclusion that the actions Hudson Berlind chose to take violated the Act." (App. pp. 18-19)[4]

This petition followed.

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[4] Emphasis supplied throughout unless otherwise indicated.

Reasons for Granting the Writ

The Board's decision has important consequences for the now frequent business phenomena presented here: namely, the consolidation and transfer of operations as a result of the acquisition of existing companies. During that process the consolidated company must, as a matter of business necessity, take some steps to stabilize and rationalize its labor relations. Here the collective bargaining agreements for the employees were to expire shortly, and petitioner entered into an agreement with the union which *at the new site* would represent three times as many members as its potential rival. No rational basis exists for concluding that, in such circumstances, petitioner's conduct violated the act.[5] And it will not do to brush the problem aside, as did the Court below, with the laconic observation that "[w]e realize that the consolidation of separate operations can lead to difficult problems of labor relations for employers." (App. p. 18)

I.

The Board has long taken the position that an employer must remain neutral when faced with conflicting claims of rival unions which show a "real question concerning representation." *Midwest Piping & Supply Co.*, 63 NLRB 1060, 1070 (1945).[6] As an abstract proposition that rule is,

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[5] Indeed, petitioner faced the possibility that, if it refused to enter into an agreement with Local 222, it would commit an unfair labor practice under § 8 (a)(5) for refusal to bargain with a union when it lacked a good faith doubt that the union has a majority status. *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 596-97. See also *Snow & Sons*, 134 N.L.R.B. 709, enforced, 308 F.2d 687 (9 Cir. 1962), reaffirmed in *Summersville Industrial Equipment Co.*, 197 N.L.R.B. No. 113.

[6] The Board's phrase is drawn from the language of § 9(c)(1), 29 U.S.C. § 159(c)(1) which, in the election context, refers to "a question of representation." See Getman, op. cit., *infra*, p. 9, 31 U. of Chi. L. Rev. at 293-294.

as we have said, unobjectionable. The crucial issue, however, is what constitutes a "real question concerning representation." The Court of Appeals had nothing to say on the point, contenting itself with the unexplained observation that the Board's finding rested upon "substantial evidence."[7] (App. p. 19) In so doing, that Court fundamentally misunderstood the issue before it. *The Court erroneously characterized as a question of fact what is plainly a substantial question of law.* Clearly, the Board's ruling calls for explication of the meaning of § 8(a)(2). E.g. *N.L.R.B.* v. *Electrical Workers*, ___ U.S. ___. Is there a "real question" for purposes of § 8 (a)(2) as to which union will represent employees when *at all relevant times*[8]

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[7] We recognize, of course, that this Court does not sit to review substantial evidence determinations of the Court of Appeals. *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 491. See also *FPC* v. *Texaco, Inc.*, ___ U.S. ___, ___.

[8] The Board apparently seeks to obscure this fact by finding that when the transfer was completed in March Local 222's majority was reduced from a 3-1 margin to something considerably less as a result of resignations. (App. p. 39) The Board does not, it should be noted, make any finding that at the time petitioner *entered* into the agreement (*American Bread Company* v. *N.L.R.B.*, 411 F.2d 147, 152 (6 Cir. 1969)) there was less than a 3-1 majority, a point emphasized by the administrative law judge (App. p. 32). Nor, indeed, does the Board find that Local 222 in fact ever lost its majority status. The Board simply observes that *after* the agreement was signed, ten Local 222 employees did not move, there were ten replacements, and all ten Local 810 employees did move. (App. p. 39) Thus the suggestion is that Local 222 was reduced to a 21-20 majority. The description is false: the Board has the burden of proof on whether there is a "real dispute" over representation (*Iowa Beef Packers, Inc.* v. *N.L.R.B.*, 331 F.2d 176, 182-83 (8 Cir. 1964)) and there is nothing in the record which indicates that *the ten employees who replaced the resigned employees were not members of Local 222.* And the Board itself recognized in its brief (pp. 12-13) to the court below the presumption that union members are loyal to their union. See also *Harpeth Steel, Inc.*, 85 LRRM 1174, 1175. In the Court below the Board, faced with this difficulty, made a highly strained effort (pp. 12-13) to escape the force of the presumption. We submit, however, that so far as this record is concerned Local 222 *retained* its 3-1 majority.

one union has three times as many members as its rival? If there is a real question here, when is there not one?

We submit that the boundaries of *Midwest Piping* are badly in need of mapping by this Court particularly in the context of the transfer and consolidation of facilities. The central question is, after all, not a requirement of employer neutrality, but the Board's arbitrary and wooden approach to what constitutes a "real question." The need for review is particularly apparent since, as Professor Getman observed ten years ago, "many Board decisions applying the [*Midwest Piping*] doctrine have been reversed when brought to the courts for enforcement." Getman, *The Midwest Piping Doctrine: An Example of the Need for Reappraisal of Labor Board Dogma*, 31 U. of Chi. L. Rev. 292, 295 (1964). Accord, *Comment*, 111 U. of Penn. L. Rev. 930, 939 (1963). And the decision in this case enforcing the Board's order is sharply at variance with those of the Sixth and Ninth Circuits.

In *N.L.R.B.* v. *Wheland Company*, 271 F.2d 122 (6 Cir. 1959) the Sixth Circuit refused to enforce the Board's order in a context similar to this. There, as here, a consolidation and transfer of facilities had occurred; and there, as here, the evidence was that the employer had entered into an agreement with a clearly dominant union. Since the employer had no doubt of the dominant union's majority status, the Court said it "committed no unfair labor practice in doing what it was legally obligated to do." (*Id.* at 124.) (See note 5, *supra*, p. 7.) Ten years later the Sixth Circuit once again refused to enforce a Board order based on *Midwest Piping*, once again finding that there was no real question concerning representation. *American Bread Company* v. *N.L.R.B.*, 411 F.2d 147 (1969). There, in one of the situations before the Court, the second union had only eight newly signed signature cards out of a unit of over 90 employees (*id.* at 156). Nonetheless, the

Board found that a real question concerning representation existed. The Court of Appeals disagreed. In the course of its opinion, the Court stressed that the employer had dealt with a union with which it had a long standing peaceful relationship (*id.* at 155), and observed that the employer had taken no affirmative action to "intrude its economic powers to assert or encourage, or to oppose or discourage adherence to a particular labor organization." Cf. *N.L.R.B.* v. *Savair Mfg. Co.*, 414 U.S. 270, 278. The Court was satisfied that the employer had entered into an agreement with the union not simply to avoid dealing with the second union but because the first union had a clear majority.

In *NLRB* v. *Peter Paul, Inc.*, 467 F.2d 700 (1972), the Board's wooden approach to the "real question" issue once again met rejection in a court of appeals, this time the Ninth Circuit. There the Board took the position that the mere filing of a timely election petition without more was sufficient to establish the existence of a "real question." *Peter Paul, Inc.*, 185 N.L.R.B. 281, 286-290 (1970). Like the Sixth Circuit, the Ninth Circuit emphasized the lack of actual employer interference, coercion and restraint,[9] and then said:

> "The record before us demonstrates that ICW represented an overwhelming majority of the employees. If the Board was in doubt whether a real question of representation existed, it should have made a decision on that issue *prior* to entertaining the unfair labor practices claim. Here, it made no such determination." (467 F.2d at 702)

For citations to other appellate decisions *refusing* to

[9] The Court observed that "In *Midwest* there was direct evidence of interference, restraint and coercion on the part of the employer and the real issue concerning representation." (467 F.2d at 702)

enforce Board determinations that a "real question concerning representation" existed see the exhaustive opinion in *Iowa Beef Packers, Inc.* v. *N.L.R.B.*, 331 F.2d 176, 182 (8 Cir. 1964). See also Getman, *supra*, 31 U. of Chi. L. Rev. at 295 n. 14.

II.

We submit that the Board's order is fundamentally defective. Like *American Bread* and *Peter Paul, supra,* the record in this case is devoid of direct evidence of any actual interference, restraint and coercion by petitioner. Fairly read, this record discloses nothing more than that petitioner entered into a collective bargaining agreement with a union with which its predecessor had a long-term relationship and which would have a solid majority in the new facility. (See *N.L.R.B.* v. *Swift and Company*, 294 F.2d 285 (3 Cir. 1960) refusing to enforce a Board order where an employee had no reasonable basis to believe that existing union had lost its majority in the shop.)[10] Neither the Board nor the Court below sheds any light upon the meaning of "real question" in this context; neither explains why a 3-1 majority is an insufficient majority, at least absent particularized findings to the contrary.

We think that, in fact, analysis of the Board's action in this and other cases discloses that the Board believes that the *existence of a second union* with other than a "specious" claim is sufficient to trigger *Midwest Piping*. See *Peter Paul, Inc., supra*, 185 N.L.R.B. at 287: see also Getman, op. cit. *supra*, 31 U. of Chi. L. Rev. at 293-98.

[10] The Board has refused to follow the case, *Peter Paul, Inc.*, supra, 185 N.L.R.B., at 289, once again showing the wide dispartity between the Board and the Court of Appeals on the meaning of a "real question concerning representation."

Laid bare, therefore, the underlying premise of the Board's decision is the same premise rejected by the Sixth and Ninth Circuits. See also Getman, *supra*. We submit that the Board's view is plain error, and in conflict with the central thrust of § 8(a)(5) which, at the least, encourages an employer to recognize and bargain with a union absent any good faith doubt as to the union's majority status. Rather than place reliance upon an unreasoned, wooden, *per se* approach, the Board is obliged, as the Ninth Circuit held, to make some particularized inquiry to determine whether there is a "real question as to representation" —at least where, as here, that fact is not self-demonstrating. As Professor Getman observes, the "Board has the responsibility of bringing its expert judgment to bear *on the individual case before it*," rather than pursuing an inflexible, undiscriminating approach. 31 U. of Chi. L. Rev. at 310.

III.

Petitioner is held to have acted illegally even though there is no suggestion, let alone a finding, of improper conduct or purpose; even though petitioner acted sensibly to stabilize its labor relations; and even though petitioner signed an agreement with a union possessing a sizable majority. The Board never articulates how this result advances the policies of the act—particularly the im-

[11] Were it not for the presence of Local 810, petitioner's conduct would have been applauded, not criticized. For, as the Board found, the new facilities constituted a new bargaining unit and petitioner would have then been discharging its statutory obligation to deal with the union in circumstances in which he had no doubt that they constituted a majority of the employees at the new facilities. It is important to recognize here that from a business point of view the process was a continuous one. At all times petitioner and its predecessor was in a collective bargaining relationship to Local 222. The uninterpreted character of this relationship fosters the goals of the national labor policy, not defeats them.

portant policy of industrial peace. *Brooks* v. *N.L.R.B.*, 348 U.S. 96, 103.[11] The Board apparently believes that when there is any possibility of dispute, however marginal, an employer should simply "step aside" and permit the Board to resolve the representation question. That is, quite plainly, strong medicine. Faced with recognition claims, an employer must take some action, and the Board's position *requires that an employer forsake industrial peace and, instead, expose itself to a strike during the period of the contest.* Here Local 222 could have engaged in an "economic" strike, once its collective bargaining agreement had expired; and, on the Board's view, Locals 222 and 810 could have engaged in a 30-day recognitional or organizational strike. 29 U.S.C. § 158(b)(7)(c). Surely, absent substantial and clearly *articulated* countervailing considerations, the Board ought not to encourage wasteful strikes, with their particularly ruinous effects on small and medium scale businesses; nor ought the Board, absent strong *and articulated* countervailing considerations, formulate rules which discourage employers from engaging in the consolidation and transferring of facilities, by attaching as a cost thereto the threat of a prolonged labor strike of indeterminate measure. In short, the Board ought not to penalize sensible employer conduct where there is no apparent countervailing gain for national labor policy.

At no point has the Board articulated acceptable criteria for what constitutes a "real question as to representation" within the meaning of *Midwest Piping.* In so failing, the Board has, of course, failed to discharge its fundamental obligation to give a reasoned elaboration to the terms of the act. Cf. *N.L.R.B.* v. *Bell Aerospace Co.*, — U.S. —, —. That fact accounts for the exceedingly erratic record which the Board has in the courts of appeals on enforcement of its *Midwest Piping* orders. We submit, respectfully,

that this important area is one badly in need of plenary review by this Court.[12]

Conclusion

For these reasons, a writ of certiorari should issue to review the opinion and judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

LAWRENCE ROSENBLUTH
ROSENBLUTH & ROSENBLUTH
342 Madison Avenue
New York, New York 10017

HENRY P. MONAGHAN
10 Post Office Square
Boston, Massachusetts 02109

[12] One final point should be noted. The Board also characterized petitioner's agreement as an illegal pre-hire agreement in violation of § 8(a)(1) and (2). (App. p. 41) The Court of Appeals did not pass upon that point (App. p. 18 n.1) and so that question remains open if this Court reverses on the application of *Midwest Piping*. We should observe here, however, that the pre-hire agreement argument is simply another formulation of *Midwest Piping*. This case is far removed from the evil to which the prohibitions against pre-hire agreements are concerned—the employer who executes an agreement with a union prior to the commencement of business operations when no employees are available in an effort to give that union a dominant status with respect to the to-be-hired employees. E.g., *Fraser & Johnston Company* v. *N.L.R.B.*, 469 F.2d 1259, 1263-64 (9 Cir. 1972). This is a situation where existing employees of *existing* plants were expected to fill the jobs at a new facility. Petitioner, acting we submit with responsibility to its employees, made offers to the existing employees and virtually all accepted. As a matter of business reality, therefore, to characterize this conduct, independently of the *Midwest Piping* doctrine, as an illegal pre-hire agreement lacks substance, as the administrative law judge recognized. (App. pp. 28-31)

APPENDIX A

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
HUDSON BERLIND CORPORATION,
Respondent.
No. 493, DOCKET 73-2112
UNITED STATES COURT OF APPEALS, SECOND CIRCUIT
Argued Feb. 20, 1974.
Decided April 5, 1974.

Peter G. Nash, Gen. Counsel, John S. Irving, Deputy Gen. Counsel, Patrick Hardin, Associate Gen. Counsel, Elliott Moore, Deputy Associate Gen. Counsel, John D. Burgoyne and Stanley R. Zirkin, Attys., N.L.R.B., Washington, D.C., on the brief, for petitioner.

Lawrence Rosenbluth, New York City (Rosenbluth & Rosenbluth, New York City, on the brief), for respondent.

Before LUMBARD, FRIENDLY and TIMBERS, Circuit Judges.

LUMBARD, Circuit Judge:

The National Labor Relations Board petitions this court for enforcement of its order of May 2, 1973, which found that the Hudson Berlind Corp. violated the National Labor Relations Act when it entered into a collective bargaining agreement with Local 222 of the International Production, Service and Sales Employees Union at a new, consolidated facility. 203 N.L.R.B. No. 63. The Board concluded that by signing this agreement Hudson Berlind violated its duty under the Act to remain neutral until its employees' choice of bargaining representative at the new facility was settled. For reasons set forth below, we enforce the Board's order.

H. Berlind, Inc. was engaged in the wholesale distribution of household goods and related products with its principal place of business at Floral Park, New York. Its

ten warehouse employees were representd by Local 810, Steel, Metals, Alloys, and Hardware Fabricators and Warehousemen, affiliated with the International Brotherhood of Teamsters. Local 810's agreement with H. Berlind had an expiration date of April 18, 1972.

Hudson Housewares Corp. was also in the business of wholesale distribution of household goods. Its principal place of business was Brooklyn and its thirty-one warehouse employees were represented by Local 222, affiliated with the International Production, Service and Sales Employees Union. Local 222's agreement with Hudson Housewares was set to expire on March 15, 1972.

In September 1971 H. Berlind was purchased by Greenman Brothers, Inc. Greenman Brothers then purchased Hudson Housewares in December 1971. From the outset, Greenman Brothers intended to consolidate the two operations in a new facility at Hicksville, New York, about 40 miles from the Brooklyn location. In anticipation of the consolidation, Hudson Housewares was renamed Hudson Berlind Corp. in January 1972.

Since Local 222 represented a larger number of warehouse employees than Local 810, Hudson Berlind decided to recognize Local 222 as the bargaining representative of its warehouse employees at the new Hicksville facility. Without notifying Local 810 of the planned consolidation, Hudson Berlind opened negotiations with Local 222. On January 31, 1972, they signed a three-year agreement effective on March 15, 1972, which recognized Local 222 as the bargaining representative of warehousemen at Hudson Berlind facilities in the New York metropolitan area. The agreement contained a union-security clause which required all warehousemen to join Local 222 within thirty days of their hiring.

From January 31 to March 10 Hudson Berlind transferred its operation from Brooklyn to Hicksville. During

this period, ten of the employees who had worked in Brooklyn left the employ of Hudson Berlind and were replaced by ten new members. Thus, when the transfer to Hicksville was complete on March 10, twenty-one of the thirty-one warehousemen at Hicksville had previously been Local 222 members at Brooklyn.

Meanwhile, in February Local 810 gave notice that it wished to renegotiate its contract. The former owner of H. Berlind informed the union for the first time that Greenman Brothers had purchased the company and would soon be in touch with Local 810's officers. At a meeting held on February 24, Greenman Brothers' attorneys told Local 810's president that Greenman Brothers planned to close down the Floral Park operation and move it to Hicksville and that Local 222 would represent the warehousemen there. The attorneys agreed to send Local 810 a copy of the Local 222 agreement and a seniority list of the Brooklyn employees.

Subsequently on March 15 Local 810 filed the unfair labor practice charges at issue here. Local 810 also solicited authorization cards from former Hudson Houseware employees who had transferred to Hicksville and on April 7 filed a representation petition with the Board. This petition has been held in abeyance pending disposition of the unfair labor practice charges.

At the end of May operations at Floral Park were terminated, but Hudson Berlind offered employment at Hicksville to all the warehousemen who had worked at Floral Park. All ten of the Floral Park warehousemen accepted employment at Hicksville, beginning in the first week of June.

Overruling the recommended decision of its administrative law judge, a three-member panel of the National Labor Relations Board found that Hudson Berlind violated the Act by recognizing Local 222 as the bargaining agent of

the Hicksville warehousemen. The Board initially held that the Hicksville facility was not a relocation or an accretion of the Brooklyn bargaining unit, but rather a new bargaining unit. The Board then found that there was a "real question" concerning which union would be chosen by the Hicksville warehousemen to represent them at the time the contract of January 31 was signed and that Berlind had an obligation under the decision of Midwest Piping & Supply Co., 63 N.L.R.B. 1060 (1945), to remain neutral as between the unions until the representation question is settled. Hudson Berlind's failure to remain neutral was held to be unlawful aid to Local 222 in violation of § 8(a)(2) of the Act, 29 U.S.C. § 158(a)(2). The inclusion of the union-security clause in the contract was further held to violate §§ 8(a)(1) and (a)(3) of the Act, 29 U.S.C. §§ 158(a)(1), (a)(3).[1]

The Board ordered Hudson Berlind to cease and desist from aiding Local 222 and from requiring membership in Local 222 as a condition of employment in violation of the Act. Hudson Berlind was also ordered to withdraw recognition of Local 222 as bargaining agent of its Hicksville employees and to return to its warehousemen, except those who joined Local 222 prior to the January 31 agreement, the money paid by them or withheld from them for union dues and initiation fees.

[1] We realize that the consolidation of separate operations can lead to difficult problems of labor relations for employers, see, e.g., the situation in Wheland Co., 120 N.L.R.B. 814 (1958), enforcement denied, 271 F.2d 122

[1] The Board held in the alternative that since the agreement signed with Local 222 dealt with the terms of employment of Hicksville employees before any of them worked there, it was a prehire contract in violation of §§ 8(a)(1) and (a)(2) of the Act. Since we enforce the Board's order on the grounds mentioned in the text, there is no need for us to determine the validity of this alternative holding.

(6th Cir. 1959). Be that as it may, we find substantial evidence to support the Board's finding that there was a real question concerning representation when Hudson Berlind signed the agreement with Local 222 and its conclusion that the actions Hudson Berlind chose to take violated the Act. Hudson Berlind does not quarrel with the principle of *Midwest Piping*, which we have approved on several occasions, see, e.g., N.L.R.B. v. Midtown Service Co., 425 F.2d 665 (2d Cir. 1970); Welch Scientific Co. v. N.L.R.B., 340 F.2d 199 (2d Cir. 1965); N.L.R.B. v. National Container Corp., 211 F.2d 525 (2d Cir. 1954), but argues that the principle does not apply in this case.[2] We cannot agree.

First, the Board found that Hicksville was a separate bargaining unit and not a relocation or accretion of the Brooklyn unit. We have previously said that the Board has "wide discretion in determining the appropriate bargaining unit." N.L.R.B. v. Masters-Lake Success, Inc., 287 F.2d 35, 36 (2d Cir. 1961). See also Packard Motor Car Co. v. N.L.R.B., 330 U.S. 485, 491-492, 67 S. Ct. 789, 91 L. Ed. 1040 (1947). There is substantial evidence to support the Board's finding that Hicksville was a separate unit since it was a consolidation of two previously separate units and some distance away from each of them. See General Electric Co., 170 N.L.R.B. 1272 (1968); National Carloading Corp., 167 N.L.R.B. 801 (1967); Kroger Co.,

[2] Hudson Berlind also argues that we cannot enforce the Board's order because the Board never found that it was a successor to H. Berlind and therefore it had no duty to bargain with Local 810 about the terms of employment at Hicksville. Hudson Berlind relies on cases which hold that an employer who is a successor must recognize and bargain with the union that represented his predecessor's employees. See, e.g., N.L.R.B. v. Burns International Security Services, Inc., 406 U.S. 272, 92 S. Ct. 1571, 32 L. Ed. 2d 61 (1972). This reliance is misplaced. The Board did not hold that Hudson Berlind had a duty to recognize Local 810 but rather that it had a duty not to recognize any union until the representation question at Hicksville was settled.

155 N.L.R.B. 546 (1965). Because Hicksville was a separate bargaining unit, the cases which Hudson Berlind cites that rely on a presumption of continuing majority status for a previously certified union within the same bargaining unit are not on point. See N.L.R.B. v. Swift & Co., 294 F.2d 285 (3rd Cir. 1961); Harpeth Steel, Inc., 208 N.L.R.B. No. 84 (1974). See also N.L.R.B. v. Midtown Service Co., supra.

[2] Second, there is substantial evidence to support the Board's finding that there was a real question concerning representation at the time of the signing of the contract. See Empire State Sugar Co. v. N.L.R.B., 401 F.2d 559 (2d Cir. 1968); Fruehauf Trailer Co., 162 N.L.R.B. 195 (1966); Purolator Products, Inc., 160 N.L.R.B. 80 (1966); Schreiber Trucking Co., 148 N.L.R.B. 697 (1964). Hudson Berlind argues that there was no real question because the Local 222 unit was larger than the Local 810 unit. It is true that Local 222 had 31 members in Brooklyn and Local 810 had only ten members at Floral Park, but this numerical superiority was not sufficiently predominate to remove any real question concerning representation. Cf. National Carloading Corp., supra; Purolator Products, Inc., supra. The Hicksville facility was about 40 miles from the Brooklyn warehouse and it was not clear how many employees would choose to transfer from Brooklyn and Floral Park to Hicksville when Hudson Berlind signed the agreement with Local 222. Cf. Cooper Thermometer Co. v. N.L.R.B., 376 F.2d 684 (2d Cir. 1967). There was, therefore, no assurance that Local 222's predominance would continue.

[3] Hudson Berlind also argues that there was no real question concerning representation because Local 810 made no demand to represent the Hicksville employees, but the Board found that Local 810's officers did not learn of the planned consolidation until after Hudson Berlind signed

the agreement with Local 222 on January 31, 1972. One can hardly expect Local 810 to react to a situation which it did not know about. Cf. N.L.R.B. v. Burke Oldsmobile, Inc., 288 F.2d 14, 16 (2d Cir. 1961). We, therefore, cannot set aside the Board's finding on this issue.

[4] Since there was a real question concerning representation at the time Hudson Berlind entered into the agreement with Local 222, the Board properly found that Hudson Berlind's conduct violated § 8(a)(2) of the Act. Empire State Sugar Co. v. N.L.R.B., supra. The Board was also correct in finding that the presence of a union-security clause in the agreement violated §§ 8(a)(1) and (a)(3). N.L.R.B. v. Fiore Brothers Oil Co., 317 F.2d 710 (2d Cir. 1963); N.L.R.B. v. Revere Metal Art Co., 280 F.2d 96, 100 (2d Cir.), cert. denied, 364 U.S. 894, 81 S. Ct. 225, 5 L. Ed. 2d 189 (1960). Accordingly, a judgment will be entered enforcing the Board's order.

JUDGMENT

Before: LUMBARD, FRIENDLY AND TIMBERS,
Circuit Judges.

THIS CAUSE came on to be heard upon the application of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent, Hudson Berlind Corporation (Greenman Brothers), its officers, agents, successors, and assigns on May 2, 1973. The Court heard argument on February 20, 1974, and has considered the briefs and transcript of record filed in this cause. On April 5, 1974, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's Order.

ON CONSIDERATION WHEREOF, it is hereby ordered and

adjudged by the United States Court of Appeals for the Second Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Hudson Berlind Corporation, (Greenman Brothers), its officers, agents, successors, and assigns abide by and perform the directions of the Board in said Order contained.

IT IS FURTHER ORDERED that costs shal lbe taxed against the Respondent.

J. EDWARD LUMBARD
Judge, United States Court of Appeals for the Second Circuit

HENRY J. FRIENDLY
Judge, United States Court of Appeals for the Second Circuit

FILED: April 25, 1974

A true copy,
(s) (Illegible), *Clerk.*

APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

Case No. 29-CA-2795
HUDSON BERLIND CORPORATION
and
LOCAL 810, STEEL, METALS, ALLOYS AND
HARDWARE FABRICATORS AND WAREHOUSEMEN,
affiliated with
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA
and
LOCAL 222, affiliated with
INTERNATIONAL PRODUCTION, SERVICE AND
SALES EMPLOYEES UNION
Party to the Contract

DECISION

HENRY L. JALETTE, Administrative Law Judge: This case involves allegations that the Respondent, Hudson Berlind Corporation, violated Section 8(a)(1), (2) and (3) of the Act by executing a contract with Local 222, affiliated with International Production, Service and Sales Employees Union (hereinafter referred to as Local 222) relating to the terms and conditions of employment of its employees at a new plant to be opened by Respondent in Hicksville, New York, at a time when the Respondent did not employ any unit employees at such plant, at a time when Local 222 had not been duly designated by a majority of the unit employees as their exclusive representative, and at a time when a valid question concerning repre-

sentation existed at the Hicksville plant. The allegations are contained in a complaint issued on August 4, 1972, pursuant to a charge filed by Local 810, Steel, Metals, Alloys and Hardware Fabricators and Warehousemen, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter referred to as Local 810) on March 15, 1972.

The hearing was held in Brooklyn, New York, on October 2, 1972.

Upon the entire record, including my observation of the witnesses, and after consideration of the briefs filed by General Counsel and Respondent, I make the following findings of facts, conclusions of law, and recommendations.

Findings of Fact

I. The Facts

Prior to on or about May 30, 1972, H. Berlind, Inc. (hereinafter referred to as Berlind) a New York corporation, was engaged in the wholesale distribution and sale of household goods and related products with its principal office and place of business at Floral Park, New York. Local 810 was the collective-bargaining representative of the warehouse employees and there was a collective-bargaining agreement with an expiration date of April 18, 1972.

On or about September 1, 1971, Berlind was purchased by Greenman Brothers, Inc., (hereinafter referred to as Greenman).

Prior to February 28, 1972, Hudson Housewares Corp., (hereinafter referred to as Hudson) was engaged in the wholesale distribution and sale of household goods and related products with its principal office and place of business in Brooklyn, New York. Local 222 was the collective-bargaining representative of Hudson's warehouse em-

ployees and there was a collective-bargaining agreement with an expiration date of March 15, 1972.

On or about December 16, 1971, Hudson was purchased by Greenman. In January 1972, Greenman renamed the Hudson corporation Hudson Berlind Corporation, the Respondent herein.[1]

On or about January 31, 1972, Respondent and Local 222 executed a new collective-bargaining agreement effective from March 15, 1972 to March 15, 1975. At the time this agreement was executed Respondent was still engaged in the wholesale distribution and sale of household goods and related products from its place of business in Brooklyn, New York. However, Respondent had decided before January 31 to close down its Brooklyn operations and transfer them to Hicksville, and the contract which it entered into with Local 222 on January 31, 1972, covered operations not only at the Brooklyn plant but also at the Hicksville plant.

On January 31, the date of the execution of the contract, Respondent employed 31 warehousemen.

Between January 31 and March 10, Respondent was engaged in the process of transferring its operations from Brooklyn to Hicksville, and in doing so employees of the Brooklyn facility performed services and worked at the Hicksville facility. This process was completed on March 10.

During the moving process from January 31 to March 10, 10 of Respondent's employees who had been on the payroll on January 31, left its employ and were replaced by 10 new employees. Thus, when the move was finally completed on March 10, the complement of employees at Hicksville consisted of 21 employees who had been on the

[1] Jurisdiction is not in issue. The complaint alleges, the answer admits, and I find, that at all times material herein Respondent met the Board's $50,000 direct outflow standard for the assertion of jurisdiction.

payroll on January 31 and 10 employees hired between January 31 and March 10.

While this process was going on, events were occurring at the Floral Park warehouse which were to lead to this proceeding. As noted earlier, Local 810 had a contract with Berlind with an expiration date of April 18, 1972. After Local 810 sent out the usual 30-day and 60-day notices for termination or modification of the contract, Local 810 President Dennis Silverman was advised by Morris Berlind, former owner of Berlind, that he had no authority to negotiate and Greenman would be in touch with him. Thereafter, the attorneys for Greenman arranged a meeting with Silverman on February 24 where they advised him that Greenman had taken over both Berlind and Respondent and that both companies were to be moved to Hicksville. They told Silverman that inasmuch as Respondent employed more employees than Berlind Respondent considered it right and proper that Local 222 represent the employees at Hicksville.

Silverman responded by pleading ignorance of such matters and stated he was there to negotiate a contract for Berlind's employees. The attorneys refused. Silverman asked when they expected to move the Berlind company to Hicksville and the attorneys told him the lease at Floral Park was expiring on June 1.

The meeting ended with a promise by the attorneys to submit to Local 810 a copy of the Local 222 contract and a seniority list of the Brooklyn warehouse employees. Thereafter, Local 810 filed the charge herein. Other meetings were held therafter and all the warehouse employees at Floral Park were offered employment as employees of Respondent at Hicksville. In the first week of June, these employees, 10 in number, began working at Hicksville.

At some point during this period, Local 810 attempted to organize the employees at Hicksville and on April 7

it filed a petition for an election in Case No. 29-RC-1961. Action on the petition has been held in abeyance because of the instant proceeding.

II. Analysis and Conclusions

According to the complaint there are three separate bases for holding that Respondent violated Section 8(a) (1), (2) and (3) of the Act by executing a contract with Local 222 on January 31 covering the operations to be opened in Hicksville: at the time of the execution of the contract, (1) Local 222 was not the duly designated representative of a majority of the warehouse employees at the Hicksville plant covered by the contract; (2) Respondent did not employ any warehouse employees at the Hicksville plant; and (3) there existed a question concerning the representation of the employees to be employed at the Hicksville plant.

As to the first basis for finding a violation, I am uncertain of General Counsel's theory. No evidence of Local 222's majority status in any unit was adduced at the hearing. As an incumbent union at the Brooklyn warehouse Local 222 was entitled to a presumption of majority in a unit of 31 employees when it executed the contract on January 31. Since the contract of January 31 covered the Hicksville warehouse in addition to the Brooklyn warehouse, Local 222 may not have been entitled to a presumption of majority in the Hicksville unit, but the record indicates that on March 15, 1972, when the Hicksville warehouse became fully operative it was staffed by 31 employees (the same number as were employed on January 31) 21 of whom had been employees of the Brooklyn warehouse on January 31. Although we do not know whether the 21 "old" employees were members of Local 222 or had designated it to represent them, the figures alone suggest that Local 222 enjoyed majority status when the plant became fully operative. In any event, the burden was on

General Counsel to show that Local 222 did not enjoy majority status at the Hicksville warehouse. This he failed to do.

As to the second basis for finding a violation, namely, that at the time of the execution of the contract Respondent did not employ any warehouse employees at Hicksville the law seems clear. It is unlawful for an employer to recognize a union as the representative of his employees when they have not yet been hired and have not been afforded the opportunity to decide who, if anyone, will be their representative for purposes of collective bargaining. *Safeway Stores, Inc.*, 111 NLRB 968; *John B. Shriver Company*, 163 NLRB 23, 28. Even where the employer has hired some employees and has begun production, his recognition of a union will be deemed unlawful unless at the time he grants recognition he has in his employ a representative complement of employees. *Lianco Container Corp.*, 173 NLRB 1444, 1448. I do not understand Respondent to quarrel with these principles. What Respondent is saying is that it did not sign a contract covering employees to be hired at Hicksville, but rather, that it signed a contract covering its employees at Brooklyn who were to be the same employees employed at Hicksville. In effect, what Respondent is here contending is that the facts show a relocation of operations employing the same employees and that the cases relied upon by General Counsel are distinguishable.

In support of his position, General Counsel relies on 2 types of cases. One type is a line of representation cases dealing with contract bar rules in merger and plant relocation situation; the other type involves unfair labor practice proceedings in similar situations. As to this latter type of case, General Counsel relies principally on *Schreiber Trucking Company, Inc.*, 148 NLRB 697.

In my judgment, the facts of that case render it inap-

plicable to this case. In *Schreiber,* in merging operations from Greensburg and Pittsburgh, Pennsylvania, and relocating in Irwin, Pennsylvania, the respondent executed a contract with the union which had represented a unit of two employees at the Greensburg terminal and froze out a unit of 11 employees at the Pittsburgh terminal represented by another union. In staffing the Irwin terminal, the respondent hired new employees for the purpose to the exclusion of old employees at the Pittsburgh terminal. Thus, *Schreiber* presents a situation not only of plant merger and relocation, but also of staffing of the new plant by employees newly hired for the new plant. In addition, *Schreiber* contracted with the Union which had represented the smaller of the two units being merged. In this case, the new warehouse was staffed in substantial part by old employees and Respondent contracted with the Union representing the larger of the 2 groups to be merged.

W. L. Rives Company, 136 NLRB 1050, cited by the Trial Examiner in *Schreiber* and by General Counsel at the hearing, is similarly factually distinguishable from this case. There, *Rives* set up a separate operation to which it transferred unit work, and then it recognized the Pipefitters Union and employed that union's members to do the work formerly performed by the employees represented by the Sheetmetal Workers Union.

The third unfair labor practice case relied upon by the General Counsel is *Purolator Products, Inc.,* 160 NLRB 80, and it too is factually distinguishable. In *Purolator,* the contract was found to be unlawful because the union with whom the company had signed a contract did not represent a majority of the employees in the unit. The record in this case does not support such a finding.

In short, the facts of the unfair labor practice cases cited by General Counsel are so different from the facts

of this case that they cannot be viewed as authority for finding the contract herein unlawful. Of course, case precedent is not essential if it appears that Respondent's conduct was in fact violative of established principles. My difficulty has been in determining which principle of law Respondent violated. Local 222 was not a minority union and the contract was not truly a prehired contract because Respondent intended to, and did, transfer its Brooklyn employees to Hicksville.

It is this fact, the transfer of employees from Brooklyn to Hicksville, which distinguishes this case from those relied upon by General Counsel. As I have noted earlier, General Counsel relies on representation cases in support of his contention that the contract herein was unlawful. One of these cases, the lead case actually, is *General Extrusion Company, Inc.*, 121 NLRB 1165. In that case, the Board laid down the rule that a contract does not bar an election if changes have occurred ". . . in the nature as distinguished from the size of the operations between the execution of the contract and the filing of the petition, involving (1) a merger of two or more operations resulting in creation of an entirely new opration with major personnel changes." In adopting this rule, the Board added ". . . a mere relocation of operations accompanied by a transfer of a considerable proportion of the employees to another plant, without an accompanying change in the character of the job and the functions of the employees in the contract unit, does not remove a contract as a bar."

It is this latter statement of the Board which I believe is applicable to the facts of this case. While the Board did not define what it meant by a considerable proportion of the employees, it appears to me that the transfer of 21 out of 31 employees employed when the contract was executed involves the transfer of a considerable propor-

tion of the employees. As to the character of the jobs and the functions of the employees in the contract unit, they remained unchanged by the merger and relocation. Before the merger, the operation consisted of the wholesale and distribution of household goods and related products employing one classification of employees, warehousemen. With the exeception of the addition of a few new product lines, the operation remained the same after the merger and still employed only one classification of employees, Although the Hicksville warehouse was more modern and new equipment was used to handle the goods, the work was still warehousing.

But even where a merger and relocation result in an entirely new operation, a contract executed prior to the merger and relocation may still operate as a bar if at least 30 percent of the employee complement at the time of the hearing was employed at the time the contract was executed and 50 percent of the employee classifications had been filled. *The Kroger Company*, 155 NLRB 546, 549. In this case, there was a single classification and 20 of the 31 employees employed at Hicksville at the time of the hearing herein were employed at the time the contract was executed. Thus, applying *General Extrusion* standards, the contract of Local 222 would be deemed a bar to a representation petition by Local 810 filed after January 31.[2]

The last basis asserted for finding the contract unlawful is that it was entered into in derogation of the *Midwest Piping* principle, which holds that "an employer faced with conflicting claims of two or more rival unions which give rise to a real question concerning representation may not recognize one of these unions until its right to

[2] In *Schreiber*, the Board relied on the fact that the *General Extrusion* standards had not been met at the time the contract was executed.

be recognized has been finally determined under the special procedures provided in the Act."[3]

In arguing that the Midwest Piping principle is applicable herein, General Counsel combines two circumstances. He first states that at the time Respondent entered into the January 31 contract it was aware that Local 810 represented its warehousemen at Floral Park. He then proceeds to point out the fact of the meetings between Local 810 and Respondent's attorneys after January 31, and he adverts to the charge in the instant case and the petition filed by Local 810 on April 7. He concludes from this that "The conflicting apparently plausible claims of the two rival unions gave rise to a real question concerning representation." General Counsel does not explain, however, how the events after the execution of the contract on January 31 prove that on January 31 there existed a real question concerning representation of the employees to be employed at Hicksville.

On January 31, Local 810 had made no demand for recognition and no petition had been filed. It is true that the *Midwest Piping* principle applies even where no petition has been filed. *The Wheland Company*, 120 NLRB 814, 817; *Novak Logging Company*, 119 NLRB 1573. But where no petition has been filed, one must examine the factual circumstances in existence at the time the employer recognizes and contracts with the allegedly favored union to determine whether he was on notice of the existence of a real question concerning representation. As Respondent concedes, on January 31, it knew of the forthcoming merger and relocation of operations, and the record indicates that it knew of Local 810's representative

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[3] *Midwest Piping and Supply Company Inc.*, 63 NLRB 1060, 1070.

status at Floral Park.[4] However, Respondent also was conscious of the fact that the Local 222 unit comprised 31 employees and that of Local 810 comprised only 10 employees. Based on these figures, Respondent contends there was no basis for it to believe that there existed a real question concerning representation. Certainly, if all employees employed at both warehouses on January 31 had accepted transfers to Hicksville, any petition filed by Local 810 would not have been entertained because of Local 810's inability to make a 30 percent showing of interest based on its Floral Park representation alone. While Respondent could have assumed that not all 31 Brooklyn employees would transfer, there was no reason for it to assume that all Floral Park employees would accept transfers. If both groups accepted transfers in equal percentages Local 810 would still have been unable to meet the 30 percent showing of interest requirement. In short, on the facts herein, I find that on January 31 there did not exist a real question concerning representation and Respondent's execution of a contract with Local 222 covering the Hicksville warehouse did not conflict with the *Midwest Piping* principle.

For all the foregoing reasons, I shall recommend that complaint herein be dismissed.

Conclusions of Laws

1. Hudson Berlind Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 810, Steel, Metals, Alloys and Hardware Fabricators and Warehousemen, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen

[4] I do not credit the testimony of David Goldberg that he did not know at the time the contract was negotiated with Local 222 that Local 810 enjoyed representative status for the warehousemen at Floral Park and had a collective bargaining agreement with Berlind.

and Helpers of America, and Local 222, affiliated with International Production, Service and Sales Employees Union, are each of the them, labor organizations within the meaning of Section 2(5) of the Act.

3. General Counsel has failed to establish by a preponderance of the evidence that Respondent violated Section 8(a)(1), (2) and (3) of the Act.

RECOMMENDED ORDER [5]

Upon the basis of the foregoing findings of fact and conclusions of law, it is recommended that the complaint be dismissed in its entirety.

Dated at Washington, D.C., January 17, 1973.

(s) HENRY L. JALETTE
HENRY L. JALETTE
Administrative Law Judge

* * * * *

[Issued May 2, 1973]

[5] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

DECISION AND ORDER

On January 17, 1973, Administrative Law Judge Henry L. Jalette issued the attached Decision in this proceeding. Thereafter, both the General Counsel and the Charging Party filed exceptions and supporting briefs.[1] The Respondent filed a brief in opposition to exceptions to the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The complaint alleged that the Respondent had violated Section 8(a)(1) and (2) of the Act by recognizing and entering into a collective-bargaining agreement with Local 222, affiliated with the International Production, Service and Sales Employees Union, for employees at the Respondent's newly opened warehouse in Hicksville, New York, (1) before any employees were employed in the unit, and (2) at a time when a valid question concerning representation existed. The complaint further alleged that by entering into such agreement with Local 222 containing a union-security agreement the Respondent also violated Section 8(a)(3) of the Act.

The record shows that in the fall and winter of 1971, Hudson Berlind Corporation (Greenman Brothers, Inc.), the Respondent, acquired two wholesale distribution firms, Hudson Housewares Corp., herein called Hudson, with its

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[1] The Charging Party has requested oral argument. This request is hereby denied because the record, the exceptions, and the briefs adequately present the issues and positions of the parties.

principal office and place of business in Brooklyn, New York, and H. Berlind, Inc., herein called Berlind, with its principal office and place of business in Floral Park, New York. At the time of their acquisitions both companies were engaged in the wholesale distribution and sale of household goods and related products at their respective warehouses. Hudson's warehouse employees, numbering 31, were represented by Local 222 under a collective-bargaining agreement with an expiration date of March 15.[2] Berlind's warehouse employees, numbering 10, were represented by Local 810, Steel, Metals, Alloys and Hardware Fabricators and Warehousemen, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, the Charging Party, under a collective-bargaining contract with an expiration date of April 18.

From the outset it was the intent of the Respondent to merge the operations of both Hudson and Berlind at a new and separate facility in Hicksville, New York, approximately 40 miles from the Brooklyn location, and to designate Hudson to survive the merger of both operations under the name Hudson Berlind Corporation. It was also decided that Hudson Berlind would recognize and deal with Local 222 for all employees at the new site, because Local 222 was the incumbent in the larger of the two units.

In January, without notification to Local 810 of the proposed merger, the Respondent opened negotiations with Local 222 for a new contract and, on January 31, signed an agreement effective March 15, 1972, to March 15, 1975. Between January 31 and March 10, Respondent was engaged in the process of transferring its operation from Brooklyn to Hicksville, and employees on the Brook-

[2] Unless otherwise specified, all dates refer to the year 1972.

lyn payroll performed services and worked at the Hicksville facility. This process was completed on March 10.

After the above collective-bargaining contract was signed and before the move was completed, 10 of Respondent's employees who had been on the payroll on January 31 left its employment and were replaced by 10 new employees. Thus, when the move was finally completed on March 10, the complement of employees at Hicksville consisted of 21 employees who had been on Hudson's payroll the date the contract was signed and 10 new employees hired thereafter.

In mid-February, pursuant to contract provisions, Local 810 gave notice to Berlind of its intent to renegotiate its contract. In response, Berlind notified Local 810 for the first time that the Respondent had assumed control of Berlind's affairs, and that the request was referred to the Respondent. Subsequently, at a conference between Local 810 and the Respondent on February 24, Local 810 was advised that the Berlind operations would be moved to Hicksville and merged with the Hicksville operation around June 1, and that Local 222 would be recognized as the bargaining agent at Hicksville. Local 810 was also informed that the agreement between Local 222 and the Respondent covering the proposed warehouse unit at Hicksville had already been signed. Respondent agreed to submit a copy of the agreement and a seniority list.

Thereafter, on March 15, Local 810 filed unfair labor practice charges with the Board, and on April 7, after soliciting authorization cards from the former Hudson employees who had moved to Hicksville, filed a representation petition. All the warehouse employees at Floral Park were offered employment as employees of Respondent at Hicksville, and in the first week of June these employees, 10 in number, began working at Hicksville.

The Administrative Law Judge found, *inter alia*, that

(1) the Hicksville operation was merely a relocation of the Hudson Brooklyn operation accompanied by a transfer of the Hudson employees, without accompanying changes in the character of the job and the function of the employees in the contract unit; (2) at the time the Respondent executed its contract with Local 222 on January 31, no question of representation existed since Local 810 had made no demand for recognition and no petition had been filed; and (3) since the unit of Local 222 was approximately three times larger than that of Local 810, and since this ratio would be preserved in the relocation, the Respondent could validly presume that Local 222 would in any case continue to enjoy a majority status.

In the circumstances the Administrative Law Judge found that there was no showing that Local 222 did not enjoy majority status at the Hicksville warehouse. Accordingly, he recommended that the complaint be dismissed in its entirety. For reasons discussed below, we do not agree.

As to the nature of the Hicksville facility, we disagree that the relocation of the warehousing operation at Hicksville, which resulted from the merger of the Brooklyn and Floral Park operations, constituted an extension or an accretion to the Local 222 Brooklyn unit, and that, therefore, the contract negotiated on January 31 for the Brooklyn warehouse was properly applicable and extended to the Hicksville operation.

An accretion is found where a relatively small related operation is included or added to the coverage of a collective-bargaining unit involving a larger group of employees.[3] This was clearly not the factual situation here. The record shows that, at the Hicksville warehouse, the Respondent combined and merged the operations of the

[3] See, *e.g.*, *Byron-Jackson Division, Borg-Warner Corporation*, 117 NLRB 1613, 1616, fn. 2.

former Hudson and Berlind warehouses. It also added some new product lines and used new and improved facilities, such as more loading doors and electronic order pickers. This changed the work flow and permitted a faster and more efficient operation. Moreover, the Hicksville warehouse was located 40 miles away from and superseded the two former warehouses.

Thus, the newly established Hicksville facility was no more a part of or an accretion to the Brooklyn operation than to the Floral Park warehouse. In our view it was a new operation, resulting from the closing of two warehouses and the establishing of an entirely new facility.[4]

Moreover, we do not feel that the Respondent's conduct can be justified on the basis that the collective-bargaining unit at the Brooklyn warehouse contained over three times as many employees as were represented by the Charging Party at the Floral Park location, and that there was, therefore, a presumption that Local 222's majority continued. After the January 31 contract was signed, as noted above, 10 of the 31 employees at the Brooklyn Warehouse chose not to transfer to Hicksville, and 10 new employees were hired between the signing of the contract and before the closing down of the Brooklyn operation. Thus, the employee complement at Hicksville gave neither union a conclusive or clearly predominant position, as there were 21 former Brooklyn employees, 10 employees from Floral Park, and 10 new employees hired specifically for the Hicksville operation.[5] This conclusion is further supported by the fact that Local 810 was able to obtain a sufficient showing of interest from the employees who had moved to Hicksville to support a representation petition.

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[4] See *Schreiber Trucking Company, Inc.*, 148 NLRB 697, 702; *National Carloading Corp.*, 167 NLRB 801, 802; *General Electric Company*, 170 NLRB 1272, 1273; *The Kroger Co.*, 155 NLRB 546, 549.

[5] See *Purolater Products, Inc.*, 160 NLRB 80, 83.

As discussed above, from the outset it was the intention of the Respondent to recognize Local 222 as the collective-bargaining representative of employees to be hired or transferred to the newly established Hicksville location. While it was not unlawful for the Respondent to enter into a renewal contract with Local 222 covering the Brooklyn location, by extending that contract to a new facility which had not commenced operations and, therefore, at a time when no employees were employed. Respondent in effect entered into a prehire contract. Accordingly, we find that, by extending the contract negotiated with Local 222 at the Brooklyn location to the Hicksville location at a time when there were no employees employed within the unit, Respondent rendered unlawful assistance and support to Local 222 in violation of Section 8(a)(1) and (2) of the Act.[6]

In the factual situation involved here it was the duty of the Respondent to remain neutral with respect to which of the two incumbent unions in the existing warehouses would be the collective-bargaining representative at the newly merged facility at Hicksville. In our opinion the Administrative Law Judge erred in finding that the contract negotiated with Local 222 by the Respondent was not negotiated in derogation of our *Midwest Piping*[7] principle. It is clear that the very circumstances of the merger raised a question concerning representation. At the time of the negotiations Respondent admittedly had decided to phase out both the Brooklyn and Floral Park warehouses and to relocate the work and the employees, represented by two different unions, at a new and different location under changed working conditions. By virtue of Local 810's representative status, Respondent was on

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[6] See *Schreiber Trucking Company, supra,* 703, and cases cited in fn. 11.

[7] *Midwest Piping and Supply Company, Inc.,* 63 NLRB 1060.

notice that it was faced with conflicting claims of two unions currently representing the employees to be transferred. We find it immaterial that on the date the contract was signed, January 31, Local 810 had made no demand and no petition had been filed, or that employees employed at Floral Park were not specifically covered under the contract.[8]

This case represents a type of vice *Midwest Piping* was designed to prevent: the unilateral selection by an employer between conflicting representational claims of two or more unions, which thereby deprived the employees involved of their rights to have the question determined by the Board's processes, insuring their own freedom of selection. Accordingly, we find that within the meaning of the *Midwest Piping* principle, the Respondent's conduct violated Section 8(a)(2) of the Act.

Further, inasmuch as the Local 222 contract which Respondent unlawfully applied at Hicksville contained a union-security clause, we find, in accordance with well established precedents, that Respondent's conduct also discriminated with respect to hire and tenure of employment, thereby discouraging membership in Local 222 in violation of Section 8(a)(1) and (3) of the Act.[9]

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent violated the Act by recognizing and bargaining with Local 222 as the representatives for employees in the Hicksville warehouse and

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[8] Cf. *The Wheland Company*, 120 NLRB 814, 817; *Novak Logging Company*, 119 NLRB 1573, 1574, fn. 4.

[9] See *Schreiber Trucking Company, Inc., supra*, 703, and cases cited.

by applying the union-security clause to the employees in the unit, we shall order the Respondent to withdraw and withhold recognition from Local 222 as the representative of Respondent's employees in the Hicksville unit unless and until the Board shall certify it as such representative. We shall also order that Respondent cease giving effect to the collective-bargaining contract executed with Local 222 on January 31, 1972, or to any modification, extension, renewal, or supplement thereto. However, this order shall not be construed to require that Respondent vary any of the substantive terms, conditions, and benefits for employees currently in effect.

Having found that the collective-bargaining contract in question contained a union-security provision, we shall order the Respondent to restore to present or former employees at Hicksville any fees, dues, fines, or other payments to Local 222 which were unlawfully deducted from their pay. Additionally, the amounts of reimhbursement shall carry interest at the rate 6 percent per annum.[10]

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 222 and Local 810 are both labor organizations within the meaning of Section 2(5) of the Act.

3. By recognizing Local 222 as the bargaining representative of the employees in the Hicksville, New York, warehouse, at a time when there was no representative group of employees within the unit at Hicksville and at a time when a real question concerning representation existed with respect to said unit, and by applying Local 222's union-security contract to the said unit as detailed above, the Respondent has rendered unlawful assistance

[10] See *Bisso Towboat Company, Inc.*, 192 NLRB No. 116; *Playskool Inc.*, 195 NLRB No. 89, enforcement denied on other grounds 82 LRRM 2916, 70 Labor Cases ¶13, 512 (C.A. 7).

and support to Local 222 and thereby has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (2) of the Act.

4. By applying Local 222's union-security contract to the Hicksville unit, Respondent has discriminated with respect to the hire, tenure, and terms and conditions of employment of its employees, thereby discouraging membership in Local 810 and encouraging membership in Local 222 and engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

5. By the foregoing conduct, the Respondent has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed by Section 7 of the Act and thereby has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Hudson Berlind Corporation (Greenman Brothers), Hicksville, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Giving unlawful assistance or support to Local 222 or any other labor organization.

(b) Recognizing the above-named labor organization as the representative of any of its employees in the Hicksville warehouse unit for the purpose of dealing with Respondent concerning grievances, labor disputes, wages, rates of lay, hours, or other terms and conditions of employment.

(c) Giving any force or effect to the collective-bargaining agreement executed with the above-named labor or-

ganization on January 31, 1972, or to any modification, extension, renewal, or supplement thereto, provided however, that nothing herein shall require Respondent to vary or abandon any wage, hour, seniority, or other substantive feature of its relations with its employees, which has been established in the performance of this agreement, or to prejudice the assertion by employees of any rights they may have thereunder.

(d) Encouraging membership in the above-named or any other labor organization and discouraging membership in Local 810, Steel, Metals, Alloys and Hardware Fabricators and Warehousemen, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or in any other labor organization, by discriminating with respect to the employees' hire, tenure, and terms and conditions of employment.

(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their right of self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right is affected by the provisions of Section 8(a)(3) of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Withdraw and wihhold all recognition from Local 222 as the collective-bargaining representative of any of its employees at the Hicksville warehouse for the purpose of dealing with Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other terms or conditions of employment, unless and until

the Board shall certify said labor organization as such representative.

(b) Reimburse all present and former employees at the Hicksville warehouse, except thos who joined Local 222 prior to the execution of the union-security provision in the contract executed on January 31, 1972, for all initiation fees, dues, and other moneys, if any, paid by or withheld from them pursuant to the terms of said collective-bargaining contract, in the manner provided in The Remedy section of this Decision.

(c) Post at its warehouse in Hicksville, New York, copies of the attached notice marked "Appendix."[11] Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C., May 2, 1973.

EDWARD B. MILLER, *Chairman*
JOHN H. FANNING, *Member*
HOWARD JENKINS, JR., *Memoer*
NATIONAL LABOR RELATIONS BOARD

[SEAL]

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[11] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."